



Mr. Michael Boutte
Medicaid Deputy Director
Bureau of Health Services Financing
Department of Health
Baton Rouge, Louisiana

**RE: Appeal of Notice of Monetary Penalty – Community Case Management Implementation
(December 16, 2021)**

Dear Mr. Boutte,

This is to respectfully request that your office immediately reverse and/or rescind the Notice of Monetary Penalty (hereinafter “Notice”) referenced above, which assesses a \$5,000 per day penalty on the basis that Healthy Blue “has not entered into a contract with the CCM agency” by the deadline of November 12, 2021 established in the DOJ Agreement Compliance Guide (“Guide”). The assessment of the \$165,000 penalty is based on both legal and factual errors since Healthy Blue timely entered into a legally binding contract with Merakey Pennsylvania (“Merakey”) to serve as the Community Case Management Agency for implementation of the Community Case Management Program on November 5, 2021, as specified in the Guide (hereafter referred to as the “Merakey Contract”), and thereafter submitted this contract to the Office of Behavioral Health (“OBH”) on November 19, 2021.

1. Background

Healthy Blue has met all obligations under the Guide, and has fully and in good faith cooperated with the OBH to implement the requirements of the Guide. OBH and MCO representatives routinely meet and discuss the obligations of the MCOs to implement the programs detailed in the Guide, including contracting with a Community Case Management Agency within the time constraints established in the Guide, in an effort to assist LDH in meeting its obligations under the compromise agreement with the DOJ. During these meetings, OBH confirmed that the form of the agreement for the Community Case Manager was left to the judgment of the MCOs.

Under the Guide, Healthy Blue was required to notify OBH of the selection of one or more qualified providers for purposes of contracting for Community Case Management Services. Healthy Blue timely notified OBH of its selection of Merakey, a provider in Healthy Blue’s network that Healthy Blue determined met the requirements of a Community Case Management Agency and was willing to provide these additional community case management services as required by the Guide. The Merakey Contract confirms these obligations for the additional services for Community Case Management, and expressly confirms the Merakey’s continued services under the Health Blue Provider Agreement between Merakey and Healthy Blue (“Merakey Provider Agreement”). Healthy Blue submitted the Merakey Contract along with the Merakey Provider Agreement (effective March 27, 2021) to OBH on November 19, 2021. (Exhibit 1) In an effort to ensure full compliance, Healthy Blue followed up with Laurie Jewell/LDH Program Manager, and was informed that Healthy Blue satisfied its notice requirements for Community Case Management Agency contracting with the submission of the Merakey Contract to OBH. (Exhibit 2).

On or about December 16, 2021, LDH issued a Notice of Monetary Penalty to Healthy Blue in the amount of \$5,000 per day for 33 days, or a total of \$165,000, asserting that Healthy Blue failed to timely contract with a Community Case Management Agency on or before November 12, 2021. The Notice did not mention the Merakey Contract, and did not specify any other deficiency. Notably, neither LDH nor OBH had previously notified Healthy Blue that the Merakey contract failed to meet either form or substance

requirements or was rejected as insufficient. In the Notice, LDH did not detail any contract defect and offered no opportunity for Healthy Blue to cure any purported deficiency. While Healthy Blue denies any form or substance deficiency in its Merakey Contract, Healthy Blue has, at all times, timely and appropriately responded to OBH in the development and implementation of the activities and strategies required for Guide compliance and would have promptly implemented any requested revision to the contract specified by LDH or OBH.

However, here, the penalty is not only based on errors in fact and law, but is particularly abusive as to the amount, since Healthy Blue is being taxed with noncompliance for over 30 days that it had every reason to believe that it was in full compliance with its obligations under the Guide. The lengthy lapse in time for OBH to raise any objection or identify any specific deficiency as to the contract is not explained, and in light of the per day penalty assessment, it is patently unreasonable. LDH's Notice simply (and erroneously) states that Healthy Blue did not timely contract with a Community Case Management Agency through and including the date of the Notice. This premise is directly and undeniably contradicted by Exhibit 1, which includes the Merakey Contract for Community Case Management Services, the Merakey Provider Agreement, as amended, and the Healthy Blue email to OBH on November 19, 2021. Because Healthy Blue timely executed a legally binding agreement with a Community Case Management Agency to provide community case management services in accordance with the Guide, Healthy Blue is in full compliance with its MCO contract and no penalty is appropriate.

While LDH has the discretion to issue a Notice of Monetary Penalty without first issuing a Notice of Action, Healthy Blue respectfully suggests that the current circumstances lend itself more to a Notice of Action, rather than a Notice of Monetary Penalty. A Notice of Action would have allowed LDH and Healthy Blue to discuss any purported deficiency, which Healthy Blue could then promptly cure. This is especially true given the fact that OBH gave the MCOs no clear guidance regarding its expectations for the substance or content of these contracts and insisted on leaving that to the discretion of the MCOs. This case clearly does not represent a willful disregard of obligations since Healthy Blue timely executed a contract with Merakey for community case management services (and is currently working under that contract to implement services effective January 17, 2022). Likewise, this case does not represent repeated deficiencies. This program is novel, and the contracting requirements for the Community Case Management Agency are not specified in the Guide, or any formal instruction by LDH/OBH to the MCOs. Additionally, the current circumstances do not involve any interruption of services or impairment of rights of members to services, because the parties to the Merakey Contract are actively working towards the implementation date for services and expect no delay in providing community case management services to members by the go live date of January 17, 2021.

The language of the Notice appears to attack the validity of the Merakey Contract – as if it was not timely executed (which it was on November 5, 2021) or timely submitted to OBH (which it was on November 19, 2021). Further, LDH has not identified any specific defect in the contract that renders it null or invalid. Even so, because the obligations are not challenged between the parties, if LDH would provide any explanation or details as to any purported legal defect, the cure is a simple amendment to the contract.¹ This means that the current, ongoing contractual obligations between Healthy Blue and Merakey are effective. The Parties to that contract are actively engaged in activities under the contract with the shared commitment to implement community case management services to meet the go live date of January 17, 2022. Any amendment to that contract to address any specific deficiency should not result in any penalty,

¹ It is unclear if LDH has standing to attack the validity of the contract between Healthy Blue and Merakey, as under Louisiana law, the rights of third parties to a contract are limited. However, it is clear that the contract is not an absolute nullity under Louisiana law and given that neither of the parties to the Merakey Contract are disputing the validity of the contract, any purported defect could simply be corrected or clarified by a written amendment to the contract.

as it is clear that Healthy Blue intended to, and has at all times, in good faith, effected a binding contractual relationship and has implemented measures to comply with the objectives for community case management services as required by the Guide.

As will be set forth below, Healthy Blue disagrees with LDH's determination of contract noncompliance, as Healthy Blue submitted a legally binding contract in the time and manner required by the Guide. Healthy Blue further avers that LDH's decision to impose monetary penalties under the circumstances is inappropriate because, at all times, Healthy Blue has acted in good faith to meet the expectations of OBH/LDH in implementing the activities and programs in the Guide, is not guilty of any noncompliance related to the activities and programs in the Guide, and is fully prepared to implement the community case management services in accordance with the timeframe specified in the Guide. While Healthy Blue is confident that its contract with Merakey meets the form and substance required by the Guide, Healthy Blue will work with Merakey for amendment to the contract to clarify and implement changes, if any, identified by LDH/OBH.

2. The Decision to Impose a Penalty is Flawed.

Under the MCO contract, LDH is entitled to impose monetary penalties as a "means for LDH to obtain the services and level of performance required for successful operation of the Contract." In accordance with its contractual commitments, LDH uses the following factors as consideration for the imposition of monetary penalties:

- The duration of the violation;
- Whether the violation (or one substantially similar) has previously occurred;
- The MCO's history of compliance;
- The severity of the violation and whether it imposes an immediate threat to the health or safety of the Medicaid members; and
- The "good faith" exercised by the MCO in attempting to stay in compliance.

MCO Contract, Section 20.3.1

Given this language, a monetary penalty for failure to timely implement Community Case Management Agency contracting is completely inappropriate in light of the following undisputed facts:

- On November 5, 2021 (before the November 12 deadline) Healthy Blue timely entered into a legally binding contract under Louisiana law with Merakey to serve as a Community Case Management Agency to perform the community case management services specified in the Guide and incorporated the Guide by reference to specify the obligations of the Community Case Management Agency.
- On November 19, 2021, Healthy Blue submitted the Merakey Contract to OBH.
- The Guide establishes no "contract form" or specific terms for the Community Case Management Agency contract.
- Neither OBH nor LDH provided written guidance as to the form or content of the Community Case Management Agency contract.

Healthy Blue has made every effort to comply with the specific requirements of the Guide for contracting with a Community Case Management Agency and is taking appropriate measures under the Merakey Contract for the implementation of community case management services for members beginning January 17, 2022. Healthy Blue timely identified a provider to serve as the community case management agency and contracted with that provider to provide community case management services as specified in the Guide. Healthy Blue is in good faith with its obligations to LDH and in implementing requirements under

the Guide for community case management services. Given the existing contract and ongoing efforts to implement community case management services between Healthy Blue and Merakey, there is no reason to believe such services will not timely commence and there will be “no interruption in services”. Given the undisputed good faith that Healthy Blue has demonstrated by executing the Merakey Contract and the timely submission of such information to OBH, there is no basis for any penalty. Further, the fact that OBH/LDH failed to provide a specific objection to the Merakey Contract for a period of over 30 days, a per diem penalty is abusive and unwarranted. Finally, specification of any deficiency of the contract by OBH or LDH would merely require an amendment that would not result in any delay in providing services. Therefore, there is simply no reasonable basis for a penalty, and certainly not a per diem penalty that dates back over a month, when Healthy Blue had a good faith belief that it was fully compliant with its obligations under the Guide.

A. Healthy Blue’s contract with Merakey is legally binding.

LDH cites as the basis for the penalty that Healthy Blue (i) did not timely execute a contract for community case management services; and (ii) did not ensue adequacy of the number of community case managers and supervisors in the agency to meet the needs of the target population as specified in Section VIII, Part D of the Guide, including timely response and a specific ratio of community case managers to members. Healthy Blue’s contract with Merakey meets both of these requirements. Healthy Blue’s Letter of Agreement with Merakey is a binding contract under Louisiana law with all the necessary force and effect of law between the parties to fully, effectively, and completely “bind” its signatories, namely Healthy Blue and Merakey Pennsylvania, to fulfill their respective contractual obligations:

1. Merakey is obligated to provide Community Case Management Agency services pursuant to all of the requirements that are outlined in the Department of Justice (DOJ) Compliance Guide: 24 hours per day, seven days per week for 365 days per year, with the required staffing ratio of 1:15 trained community case managers to members in each region, and
2. Healthy Blue is required to pay for these services, specifically for cost reimbursements and a three percent (3%) administrative fee for the Community Case Management Agency services.

Under Louisiana law, a contract is an agreement by two or more parties whereby obligations are 1) created; 2) modified; or 3) extinguished. La. Civ. Code art. 1906. The Letter of Agreement is a written agreement by and between Healthy Blue and Merakey, which places legally binding obligations upon the parties. Merakey is a Community Case Management Agency required under the agreement to provide community case management services in accordance with the specifications and obligations in the Guide, and Healthy Blue is required to pay for such services to include cost reimbursement plus a 3% administrative fee. This written agreement is dated November 5, 2021, is signed by the parties, specifies an effective date of November 12, 2021, and creates continuing obligations under the contract with an “evergreen clause.”² This constitutes a valid contract under Louisiana law.

Healthy Blue did timely execute the required contract: namely a contract with an LDH-approved Community Case Management Agency by November 12, 2021, with community case management services to be provided to the DOJ Agreement Target Population members beginning January 17, 2022. As such, Healthy Blue is in full compliance, and no penalty should be assessed.

B. The Contract Incorporates the Compliance Activities Specified in the Guide.

² The Merakey Contract provides “[t]his Letter of Agreement shall be effective upon November 12, 2022 (the “Effective Date”), and shall continue in effect thereafter, unless terminated or replaced as otherwise provided herein.”

The Merakey Contract includes specifications for community case management services as defined in the Guide. Exhibit A to the Merakey Contract, the Work Description For Letter Agreement, extensively describes the Community Case Management Agency's duties and obligations derived from the Guide itself and also incorporates the entirety of the Guide requirements into Exhibit A, described as Exhibit A to Exhibit A, detailing Merakey's obligations and responsibilities to provide individualized community case management services, from planning to service delivery, 24 hours a day, seven days a week, along with the entire array of additional case management deliverables specified in the Guide. (See Exhibit 1, Merakey Contract dated 11/5/21, with Exhibit A, and Exhibit A to Exhibit A, DOJ Compliance Guide at weblink: <https://ldh.la.gov/index.cfm/page/37/n/78>). By incorporating the Guide, the Merakey Contract requires that Merakey provide an adequate number of trained community case managers and supervisors employed by each agency to ensure access and face-to-face engagement of the target population to community case managers in accordance with the minimum contact requirements and the ability to provide same day responses or next business day responses during weekends and holidays by the assigned community case manager, in accordance with the specified ratio of trained community case managers to members in each region. In addition, Exhibit A incorporated the specifications for services from the Guide, including but not limited to:

- Interventions to divert the identified member from the nursing facility or facilitate the transition from nursing facility to the community, as well as provide ongoing case management for at least one full year after successful transition or diversion.
- Case management services and processes shall be individualized and person-centered, reflecting the member's unique strengths, needs, preferences, experiences and cultural background.
- Comprehensive, culturally competent community case management services, of sufficient intensity to ensure community case managers are able to identify and coordinate services and supports to assist members with obtaining good health outcomes, achieve the greatest possible degree of self-management of disability and life challenges, prevent institutionalization or hospitalization, and connect members with resources that are based on their desires and hopes that build stability and enable them to recover and thrive.
- Assuring access to all medically necessary services covered under the State's Medicaid program and addressing social determinants of health which serve as barriers to good health outcomes, including but not limited to behavioral and physical health services, specialty services, and referrals to community resources.
- Preparing and submitting all necessary[t] *sic* reports that are required by the LDH concerning the implement of the community case management services in accord with this Vendor Contract, inclusive of the DOJ Compliance Guide that is made part hereof as Exhibit "A."

The Merakey contract is clearly intended to fully implement the Guide's requirements for community case management services.

- C. The Merakey Contract includes a clause to allow amendment or substitution as necessary to meet Program requirements.

It is undisputed that the Guide implements a new, comprehensive behavioral health program that has not been previously formulated by Healthy Louisiana. In implementation, there have been many questions raised and ongoing coordination between OBH, Healthy Louisiana and the MCOs to provide meaningful implementation to meet the requirements of the Guide. At each stage, Healthy Blue has

participated in good faith to create a process and plan to implement these activities. In one meeting, an issue arose regarding the form of the Community Case Management Agency contract, specifically whether the contract form should be a “vendor” contract or a “provider” contract. Based on oral communications from OBH, no form was specified, and the MCOs were instructed to each use their own judgment in contracting with the Community Case Management Agency. At the time of the execution of the Merakey contract, Merakey was enrolled as a Healthy Blue Participating Provider (Exhibit 1) and was in good standing with Healthy Blue and LDH. Given the potential for additional guidance from LDH/OBH, the parties agreed to include in the contract certain language to allow any change in form, as may be required, to meet Program compliance.

The Letter Agreement states that the “parties shall make best efforts to replace this letter of agreement with a fully executed Community Case Management Agreement on or prior to March 1, 2022[;]” however, the Merakey Contract is effective “November 12, 2021..., and shall continue in effect thereafter, unless terminated or replaced as otherwise provided herein.” Contrary to creating a binding requirement to replace the Merakey Contract by March 1, 2022, this provision specifies that the Merakey Contract is *fully effective until terminated or replaced*. Including a provision which would allow the parties to amend, supplement or even replace the terms of the agreement in order to anticipate future additional requirements does not diminish the effectiveness of the Merakey Contract. The Merakey Contract is a binding relationship between Merakey and Healthy Blue effective November 12, 2021, that involves current ongoing activities to meet the go live date of January 17, 2022. Rather than nullifying the Merakey Contract, this type of provision reflects a good faith effort by both Healthy Blue and Merakey to timely and fully implement both current and future obligations under the Guide, consistent with changing Program requirements.

CONCLUSION

Louisiana contract law compels a finding that this penalty be rescinded. The Merakey Contract was timely executed and specifies the requirements of the Guide for Merakey’s compliance with community case management services. Merakey and Healthy Blue have a signed, written agreement that is based on a “meeting of the minds,” which serves as a binding contract between Merakey and Healthy Blue based on any fair reading of the document itself. Healthy Blue timely and appropriately submitted this to OBH and received no objection or concern regarding the contract for over 30 days. While the delay by LDH to assert an objection to the contract is unexplained, it is simply unreasonable to issue a per diem penalty for failing to contract, when Healthy Blue clearly timely contracted with Merakey to provide community case management services as required by the Guide. Healthy Blue’s cooperative work with the Louisiana Department of Health’s representatives during the lengthy planning for the implementation of community case management services in Louisiana also demonstrates Healthy Blue’s own intent to act in accord with the provisions of the Guide that were effectuated in its binding letter agreement.

In short, the penalty should be rescinded summarily because Healthy Blue timely executed a legally binding contract under Louisiana law that meets the Guide’s requirements for contracting with a Community Case Management Agency.

Thank you for your prompt attention with this matter. We look forward to your response.

Sincerely,



Christy Valentine, MD, MBA
President